

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:21-CV-188-D

SKYLEE JOHNSON, TAYLER JOHNSON,)
and SCOTTLYN JOHNSON, minors, by)
their Guardian ad Litem, SCOTT JOHNSON,)
and LINDSEY JOHNSON,)

Plaintiffs,)

v.)

LENDLEASE (US) PUBLIC)
PARTNERSHIPS LLC, et al.,)

Defendants.)

ORDER

On September 16, 2021, plaintiffs filed their original complaint in Onslow County Superior Court. See [D.E. 1-1] 40–64. On October 27, 2021, plaintiffs filed an amended complaint. See id. at 2–19. On October 29, 2021, defendants removed the action to this court. See [D.E. 1]. On July 5, 2022, the court granted in part and denied in part defendants’ motion to dismiss the amended complaint. See [D.E. 55].

On August 9, 2022, plaintiffs filed a “first amended complaint” [D.E. 58]. On August 23, 2022, defendants moved to dismiss the first amended complaint [D.E. 61] and filed a memorandum in support [D.E. 62]. On September 13, 2022, plaintiffs filed a “corrected first amended complaint” [D.E. 63]. On September 13, 2022, plaintiffs responded in opposition to defendants’ motion to dismiss [D.E. 64]. On September 27, 2022, defendants replied [D.E. 65].

Before August 9, 2022, plaintiffs failed to request leave of court to file an additional amended complaint and also failed to ask defendants for consent to file an additional amended complaint.

Notably, on August 12, 2022, the parties submitted their joint Rule 26(f) report and set November 18, 2022, as the deadline to join additional parties or amend their pleadings pursuant to the Federal Rules of Civil Procedure. See [D.E. 60] 8. Moreover, on September 28, 2022, the court entered a scheduling order stating that motions “to amend pleadings must be made promptly after the information giving rise to the motion becomes known to the party or counsel.” [D.E. 66] 2. “Any such motions filed after November 18, 2018, must meet the standards of Fed. R. Civ. P. 15 and 16.” Id.

Plaintiffs argue that the parties’ joint Rule 26(f) report constitutes defendants’ consent to all amended pleadings before November 18, 2022. See [D.E. 64] 5. Defendants respond that the joint Rule 26(f) report does not constitute such consent. See [D.E. 65] 6.


A party may amend his pleading once as a matter of course within 21 days after service, or, if the pleading requires a response, within 21 days after service of the response or service of a motion under Rule 12(b), (e), or (f). See Fed. R. Civ. P. 15(a)(1). Otherwise, a party may amend a pleading only with the written consent of the opposing party or with leave of court. See Fed. R. Civ. P. 15(a)(2). A court must “freely give leave [to amend] when justice so requires.” Id.

The court rejects plaintiffs’ argument. First, plaintiffs filed their first amended complaint on August 9, 2022, which is before the August 12, 2022, joint Rule 26(f) report. Thus, the joint Rule 26(f) report does not constitute consent to the first amended complaint of August 9, 2022. Moreover, the relevant language in this court’s scheduling order sets forth the deadline for amending pleadings and the standard that the court will use to evaluate such proposed amendments, not a waiver of Rule 15. See Navigators Specialty Ins. Co. v. St. Paul Surplus Lines Ins. Co., No. 13-CV-03499, 2014 WL 645443, at *1 (N.D. Cal. Feb. 19, 2014) (unpublished). Plaintiffs improperly filed the amended complaints at docket entries 58 and 63. Nonetheless, in accordance with Rule 15(a)(2), the court

allows plaintiffs to file their “corrected first amended complaint.” [D.E. 63]; see Moore v. Equitrans, L.P., 27 F.4th 211, 218 (4th Cir. 2022); Laber v. Harvey, 438 F.3d 404, 426 (4th Cir. 2006) (en banc); Johnson v. Oroweat Foods Co., 785 F.2d 503, 509 (4th Cir. 1986). The corrected first amended complaint at docket entry 63 is the operative amended complaint in this case.

In sum, the court DENIES AS MOOT defendants’ motion to dismiss [D.E. 61] the amended complaint at docket entry 58. Defendants may file a response to plaintiffs’ corrected first amended complaint at docket entry 63 not later than January 23, 2023. See Fed. R. Civ. P. 15(a)(3).

SO ORDERED. This 21 day of December, 2022.



JAMES C. DEVER III
United States District Judge